

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, ex rel. W.A.)
DREW EDMONDSON, in his capacity as)
ATTORNEY GENERAL OF THE STATE)
OF OKLAHOMA AND OKLAHOMA)
SECRETARY OF THE ENVIRONMENT)
C. MILES TOLBERT, in his capacity as the)
TRUSTEE FOR THE NATURAL)
RESOURCES FOR THE STATE OF)
OKLAHOMA,)

Plaintiff,)

v.)

Case No. 05-CV-00329 GKF-SAJ

TYSON FOODS, INC., TYSON)
POULTRY, INC., TYSON CHICKEN,)
INC., COBB-VANTRESS, INC., CAL-)
MAIN FOODS, INC., CAL-MAINE)
FARMS, INC., CARGILL, INC.,)
CARGILL TURKEY PRODUCTION, LLC,)
GEORGE'S, INC., GEORGE'S FARMS,)
INC., PETERSON FARMS, INC.,)
SIMMONS FOODS, INC., and WILLOW)
BROOK FOODS, INC.,)

Defendant.)

**BRIEF OF *AMICUS CURIAE* OKLAHOMA FARM BUREAU INC.
IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [Dkt 1373]**

It is odd that two Oklahoma officials would seek relief that would change the face of agriculture by its direct effects in a million acres of land in two states without including any of the agencies statutorily granted power over activities targeted or any of the people whose livelihoods would be impacted. It is odd that they would use a draconian request for a preliminary injunction as the vehicle to achieve an interpretation of RCRA that would, if established, prohibit the use of animal manure as fertilizer anywhere, particularly since their

interpretation conflicts with more than 25 years of EPA construction and flies in the face of the choices and actions of the one state agency to whom the legislature has entrusted the subject matter. It is odd that they would attempt to use a United States District Court as the venue for an end run around the state's legislative and regulatory bodies while claiming for themselves an unwarranted mantle of the state's authority and interest. Odd but true.

Oklahoma statutorily allocated its environmental protection and enforcement responsibility among various administrative agencies. The State of Oklahoma assigned responsibility for environmental regulation and environmental enforcement in matters related to animal wastes and fertilizers to the Department of Agriculture ("ODAFF"). *See*, OKLA. STAT. tit. 27A, § 1-2-101(D) ("The Oklahoma Department of Agriculture, Food and Forestry shall have the following jurisdictional areas of environmental responsibility...(a) point source discharges and nonpoint source runoff from agricultural production, agricultural services, livestock production, silviculture, feed yards, livestock markets and animal waste, [and] (d) fertilizer.") Pursuant to its grant of jurisdiction from the legislature, ODAFF extensively regulates the use of poultry litter as a fertilizer. *See* generally, discussion of Oklahoma's extensive regulatory structure governing poultry litter at pp. 4-10 of [Dkt 1530] Defendants George's, Inc. and George's Farms, Inc.'s Separate Response Brief in Opposition to Plaintiff's Motion for Preliminary Injunction. *See also* Exhibits ("Ex.") 1-8, 10-12 hereto. For instance ODAFF regulates who can apply poultry litter to land, requiring a certificate, and prescribing qualifications and continuing education requirements for litter applicators. *See* Oklahoma Poultry Waste Applicators Certification Act, OKLA. STAT. tit. 2, §§ 10-9.16-10-9.21. ODAFF regulates the use of poultry litter as a fertilizer, requiring that application be governed by an Animal Waste Management Plan ("AWMP") under which soil chemistry determines the frequency and volume of allowed litter application as

fertilizer. *See* 2 Okla. Stat. §§ 10-9.7.C; OAC §§ 35:17-5-5; OAC 35:17-5-3(b)(3). *See, also*, Ex. 11, "Code 590," the Conservation Practice Standard for Nutrient Management by which AWMs are individually designed for each farm by the U.S. Department of Agriculture Natural Resource Conservation Service or State agency experts, and Ex. 12, actual Animal Waste Management Plans of affiant Betty Anderson (Ex. 1) and her husband Bill.

Oklahoma as a state, and the families who rely on agriculture as the basis for their living, and others simply interested in the issues have actively addressed matters of water quality and animal waste through regulatory and non-regulatory mechanisms, including legislation, water quality standards, the federal-state 319 nonpoint source program, a state income tax incentive, and USDA Natural Resources Conservation Service's conservation cost share programs. Ex. 10, Affidavit of Marla Peek, Oklahoma Farm Bureau's Director of Regulatory Affairs. Oklahoma agriculture is also regulated by the Clean Water Act and other federal laws. *See, e.g.*, 33 U.S.C. § 1251 *et. seq.* These state and federal programs have been crafted by citizens, industry, regulators, and legislators after much study. Ex. 10. Plaintiffs ask the Court to judicially override these and other programs that the United States and the State of Oklahoma have mandated or encouraged, and that farming and ranching families have relied upon in managing their businesses. *See* Exs. 1 through 8, 10, 12.

The grant of an injunction would necessarily prohibit activities that are specifically allowed pursuant to regulations issued by the ODAFF, and would be financially devastating to agricultural producers in the watershed. Using the plaintiffs' figure of 347,000 tons of poultry litter produced annually in the Illinois River Watershed, the value of that litter is \$6,551,360, while the cost to replace only the nutrients in that amount of litter is \$36,661,304 as of February 13, 2008. Ex. 9, ¶¶ 6, 9. No attempt was made to measure the value of the litter with regard to

its organic matter, micronutrients, and any ability to increase pH in the soil. Ex. 9, ¶ 10. "It is clear from the affidavits submitted by Oklahoma Farm Bureau members, that they consider those aspects of poultry litter to provide great value to soil building and retention, as well as forage production." Affidavit of Michael Dicks, Ex. 9, ¶ 10.

It seems self-evident that the citizen suit provision of RCRA was not designed to enable state officials whom the legislature has not seen fit to empower with regulatory or enforcement jurisdiction to second guess the arm of state government to whom the responsibility and authority have been entrusted. Courts have not been sympathetic to attempted citizen suits that were no more than a collateral attack on the exercise of discretion necessarily implicated in regulatory and permitting responsibility. For instance, in *Greenpeace, Inc. v. Waste Technologies Industries*, 9 F.3d 1174, 1178 (6th Cir 1993), the Court rejected attempts to pursue a citizen suit against a defendant who was operating under a validly issued RCRA permit and who was not alleged to be in violation of that permit.

"First, when we read 42 U.S.C. § 6972(a) (1) (B) in the context of other RCRA provisions that specifically deal with permits, it is clear that Congress did not intend for § 6972(a) (1) (B) to authorize citizen suits against persons operating hazardous waste facilities within the limits of valid RCRA permits. However, even if Congress did intend to allow some citizen suits alleging risk of imminent and substantial endangerment to be brought against some permitted operators, it remains quite clear that § 6972(a)(1)(B) does not confer district court jurisdiction over this suit, because Greenpeace's complaint, like the similar complaint that the Fourth Circuit dismissed for lack of jurisdiction in *Palumbo* [989 F.2d 156 (4th Cir. 1993)], amounts to nothing more than an improper collateral attack on the prior permitting decisions of the U.S. EPA to allow the test and post-test burns. *Palumbo*, 989 F.2d at 159." *Greenpeace, Inc.*, 9 F.3d at 1178.

The principle prohibiting collateral attack on the regulatory process applies with particular force when the collateral attack comes from sister agencies of the state government who, have not been specifically entrusted with the responsibility of regulating poultry litter. What becomes of the legislative power to allocate duties and responsibilities if it can be flaunted

at the whim of an officer who is supposed to represent the state rather than go off on a frolic of his own?

Of what significance are separation of powers and the constitutional allocation of the power to influence laws to citizens, including Oklahoma Farm Bureau and its members? The early history of the United States reflects the ideology that gave birth to the free-speech guarantee. In crafting what became the United States Constitution, James Madison fulfilled the need to provide the minority position a platform to express its viewpoint by proposing what became the First Amendment to the Constitution to protect the right to speech and the freedom of the press. See John O. McGinnis, *Once and Future Property-based Vision of the First Amendment*, 63 U.Ch.L.Rev. 49, 73 n.103 (1996).

The right to petition for redress of grievances is historically the right to complain about and to the government. *Brock v. The Honorable Donald D. Thompson*, 1997 OK 127, 948 P.2d 279, 290 n. 37. The right of petition first appeared in the Magna Carta, and later was incorporated in the English Bill of Rights of 1689 before making it across the Atlantic to the United States. See, Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142 (1986). Oklahoma's right-to-petition clause¹ is similar to, and no doubt taken from, Article I of the U.S. Constitution². As the Court notes in *Thomas v. Collins*, 323 U.S. 516, 530, 65 S.Ct. 315, 322, 89 L.Ed. 430 (1945), the right of petition is a basic freedom in a participatory government, closely related to freedom of speech.

¹ "The people have the right peaceably to assemble for their own good, and to apply to those invested with the powers of government for redress of grievances by petition, address, or remonstrance." OKLA. CONST. art. 2, § 3.

² "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the government for a redress of grievances." U.S. CONST. amend. I.

Together these are the "indispensable democratic freedoms" that cannot be abridged if a government is to continue to reflect the desires of the people. *Id.*

Currently the governing body of the Oklahoma Department of Agriculture, the Board of Agriculture, is carefully constituted by statute to insure that a range of viewpoints are to be considered, a diversity requirement that doesn't constrain the ability of individual officials, like plaintiffs, to decide that everyone is out of step but them. OKLA. STAT. tit. 2, § 2-1. Perhaps more important, when regulatory and enforcement decisions are made by the agency on which the legislature has conferred jurisdiction, Oklahoma Farm Bureau and its members can and do meaningfully exercise their right to petition their government and have a voice in the creation and exercise of state environmental policy. Ex. 10. The Oklahoma Farm Bureau itself has long been involved as a participant in legislative and administrative proceedings that have resulted in the highly regulated environment in which Oklahoma poultry farmers, and farmers and ranchers generally, operate. Ex. 10. But, if the jurisdiction conferred by the legislature can be bypassed with the stroke of a pen on a federal court lawsuit, the constitutional right to petition granted in both the Oklahoma and federal Constitutions, has been nullified as effectively as if it was repealed. The voice of 168,000 OFB member families has been muted.

The Attorney General's motion portrays the public interest in simplistic terms -- the recreating public's right to clean water. But such absolutes rarely exist in the real world and never in the world of environmental policy. Setting environmental policy, as this motion asks the Court to undertake, always requires the consideration of a variety of factors, public health, science, economics, the contribution a particular policy would make to environmental protection and a multitude more. The Attorney General's view of the public interest is myopic -- public

interest has many faces, and they are the faces of real people. Some of the real people who would be hurt by the injunction have furnished affidavits. Their stories are summarized below.³

BETTY ANDERSON (See Ex. 1)

Betty Anderson and her husband Bill have been in the poultry business for 21 years, but were raising cattle for many years before that. The Andersons originally built their first poultry house to get the litter it would produce to fertilize the fields on which they raised hay to feed their cattle. They now have four pullet houses, two breeder houses, run about 250 mama cows and raise hay on 557 acres in Delaware County. If the application of poultry litter is banned in the Illinois River Watershed, it would not be cost effective for the Andersons to fertilize their grassland with commercial fertilizer.⁴ As a consequence their hay production would diminish and sage grass would return to their hay meadows. The Andersons would have to cut back by half on the number of cattle that they raise. Any finding that poultry litter is a solid waste would completely shut down the Anderson's poultry producing efforts due to the cost of disposing of tons of poultry litter rather than recycling it as they do now.

Since the Andersons have poultry houses, they also have Animal Waste Management Plans, as required under Oklahoma Statutes and regulations.⁵ They regularly take samples of the litter and the land on which it is to be applied, again as required by law. When the Attorney General sent his people to the Anderson farm to take soil samples, in a dramatic gesture they wore hazmat suits. Yet over the last twenty-one years no one has gotten sick from working around or being around litter. Moreover, the Andersons have been drinking their well water for

³ All facts in these individuals' stories are contained in their affidavits attached hereto as Exhibits 1 through 8, and in the affidavits provided by Oklahoma Farm Bureau's Director of Regulatory Affairs, Marla Peek (Ex. 10), and by economist Mike Dicks (Ex. 9).

⁴ Equivalent commercial fertilizer exceeds the cost of poultry litter by five to six times. One ton of litter, transported and spread, costs \$18.88; the nutrient equivalent in commercial fertilizer costs approximately 5.59 times that amount, or about \$105. See Ex. 9 and attached chart.

⁵ Exhibit 12 contains the Anderson's AWMPs.

more than sixty years, and no one has gotten sick from drinking water from wells that are on land on which litter has been applied as a fertilizer.

JOHNNY CARLILE (See Ex. 2)

Johnny Carlile is the fifth generation in his family to farm in Cherokee County. The Carlile ranch is approximately 600 to 700 acres, and Johnny has been raising cattle all his life. He currently runs between 100 and 150 head and raises the hay to feed them. He cuts hay once a year, then uses the field as a pasture. With the poultry litter he applies when he can get it, Mr. Carlile gets about four bales of hay to the acre. Mr. Carlile cannot put down commercial fertilizer because of the cost. *See* footnote 4 *infra*, and Ex. 9. At the current rate, the cost of commercial fertilizer is many times the cost of poultry litter. Using commercial fertilizer, a bale of hay would cost roughly double -- \$40 to \$50 a bale. Mr. Carlile is a believer in the benefits of natural fertilizer. His view is that when poultry litter is applied, it will grow grass where commercial fertilizer will not. The benefits he sees include adding organic matter, loosening the soil, and slowly releasing nutrients. Mr. Carlile believes that taking care of the land that provides his living is necessary if his grandson is to be able to achieve his dream of becoming the seventh generation to farm in Cherokee County.

JERRY HARE (See Ex. 3)

Jerry Hare is a member of the Cherokee Tribe who has ranched since 1968. His ranch is approximately 520 deeded acres, and he cuts hay from another 150 acres in Cherokee County. He runs cow/calf units, and uses poultry litter as fertilizer on his property on and off through the years depending upon his need to grow more hay. Mr. Hare has found that poultry litter is an excellent fertilizer for hay and forage production, and that it is much less expensive than commercial fertilizer. Mr. Hare does not consider litter either a discarded material or a waste because it is valuable to his ranching operations. The nutrient effects of litter last longer than the

effects of commercial fertilizer. He can see those effects on the second and third hay cuttings when he cuts hay that often. If the Attorney General is successful in securing an injunction preventing the land application of poultry litter, then it would definitely impact Mr. Hare's operations. He would not be able to raise as much hay, and would have to cut back on the number of cattle that he runs to whatever number the land would support without the use of either litter or commercial fertilizer. Mr. Hare lives on Barron Fork, which he considers "a jewel." His grandchildren swim there. No one has ever gotten sick from swimming in that water or from being around fields on which litter has been applied. Mr. Hare is "careful to take care of [his] land for future generations."

GENE COLBURN (See Ex. 4)

Gene Colburn is a rancher from Proctor, Oklahoma, who has been in cattle ranching for about 70 years. He runs cow/calf units and bales hay on approximately 710 acres in Cherokee County. Mr. Colburn uses poultry litter as fertilizer on his ranch when he can get it because it is better and less expensive than commercial fertilizer. When he purchases litter, he gets it from a Certified Poultry Waste Applicator. His experience tells him that spreaders will not put any more litter on land than is allowed by law. He takes and tests soil samples which let him know how much litter he can apply. Mr. Colburn believes that if he could not use litter as a fertilizer and to enrich his soil, his operations would be negatively impacted. He would not be able to raise as much hay. "Commercial fertilizer is expensive and doesn't do the job that litter does since commercial fertilizer is so short lasting." If the Attorney General is successful in this lawsuit, Mr. Colburn would have to do without fertilizer and cut back on the number of cattle that he runs.

RON TIMMONS (See Ex. 5)

Ron Timmons' ranch, the "Bar T Bar," consists of approximately 880 acres on which he raises cattle and hay. His property lies on both sides of the Illinois River and abuts the River. Mr. Timmons' family has had a ranch there since 1942. Mr. Timmons has a budget for fertilizer and would rather spend that budget on poultry litter. He finds litter more economical than commercial fertilizer – it gives him more "bang for the buck." It is longer lasting and better for the land because it makes the soil softer, loamier, while commercial fertilizer tends to pack the soil. Mr. Timmons has observed over the years that before the poultry industry grew up in his area, the country was full of people who could not make a living. Poultry production provides jobs. Mr. Timmons considers poultry litter a valuable by-product of the poultry industry. Farmers and ranchers have used the litter to make the rocky areas into better soil, and Mr. Timmons believes that the better soil is the driving force for the growth of the cattle industry in eastern Oklahoma.

"In 1942 my grandpa bought part of the land that I ranch on. . . I am hoping that my grandsons will be able to make this a 'century ranch.'"

While Mr. Timmons believes he could hold onto his ranch if the application of litter is banned, the end result would be that he would have to cut back on the number of cattle that his property could support with the resulting reduction of net income. He has found that the margin for making a living out of farming and ranching is narrow. "Young people cannot afford to buy the land that they need to start a farm or ranch and support themselves from it."

ERNEST DOYLE (See Ex. 6)

At age 52 Ernest Doyle believes he is the youngest grower for Cargill. Mr. Doyle raises turkeys and hay on 160 acres near Westville, Oklahoma. He sells the litter to Certified Poultry Waste Applicators. When Mr. Doyle started in the poultry business in 1979, he started with a

debt that would equal \$650,000 by today's standards. He has five more years until his business is paid for, and he is hoping to be able to survive for a little longer than that to save something for retirement. Mr. Doyle observed the regulation of farming increase over the years. He complies with all the regulations, but believes there is less and less incentive to be a farmer . . .

"what with difficulty finding people to employ, increased numbers of regulations and ever increasing fuel prices. It is really a mental strain to now have the Attorney General breathing down the neck of farmers like me."

Mr. Doyle has seen the benefits of using poultry litter to enrich the land and grow better and thicker grass. If poultry litter has to be hauled out of the watershed, the transportation costs would render it cost-prohibitive to use. If it is designated a solid waste and Mr. Doyle is required to pay to dispose of it, it would be so costly that he could not stay in business.

"The Attorney General's injunction against land application of poultry litter in the Illinois River Watershed would be the last straw to putting me out of business."

JERRY LONDOGIN (See Ex. 7)

Jerry Londogin is a 59 year old Viet Nam veteran whose family has been in cattle ranching all his life. He raises cattle and hay on 144 acres that he owns and 300 acres that he leases. Mr. Londogin works part-time as a Certified Commercial Poultry Waste Applicator. Oklahoma's laws, administered and enforced by state agencies, govern the application of poultry litter. The Oklahoma Department of Agriculture administers and enforces the provisions of the Oklahoma Poultry Waste Applicators Certification Act. They ensure that the standards for the application of litter using the procedures are met and that best management practices that are provided in the Act are used. As a Certified Commercial Poultry Waste Applicator, Mr. Londogin has educational and paperwork requirements under the Act. He must take three hours of continuing education annually and must submit an Annual Report each year that provides information about the litter he spread during the previous year. If litter is applied on land owned

by a registered poultry operation, then the application must follow the operation's Animal Waste Management Plan. Mr. Londogin has worked with poultry litter and other animal manures for many years and neither he nor his family has ever gotten sick from working with litter or other manure. He is not aware of anyone who has ever gotten sick from working with litter or other manure. If the application of litter is banned, Mr. Londogin could not purchase only commercial fertilizers and still afford to keep his leased pasture because he would lose money just raising hay. The yield that he gets on his hay would decrease while the wear and tear on his equipment and resulting repair costs would increase.

"The increase in costs that would occur if I could not use poultry litter in my cattle operations would be more than just a hardship for me, it would be financially devastating."

ROB HARRISON (See Ex. 8)

Rob Harrison, along with his father and his son, operates a dairy farm on 75 acres that he owns and about 100 to 150 acres that he leases. He usually has 100 head of "mama cows," 70 to 80 of them milking at any given time. Mr. Harrison uses poultry litter as fertilizer on his farm to raise much of the hay that he feeds his dairy herd. He does not believe he would get half the yield using commercial fertilizer. If the Attorney General is successful in banning application of litter, Mr. Harrison would have to resort to more expensive commercial fertilizers.

"What it really boils down to for me is whether or not my dairy farm can be self-sustaining. If I have to rely on commercial products I would not be able to survive as a dairy farmer. . . . If our dairy farm is not self-sustaining, then my son's future does not include this family dairy farm. In my opinion that is a very high cost."

CONCLUSION

The legal deficiencies in the plaintiffs' motion are ably set out in other briefs, but the overarching deficiency is that reengineering of already highly regulated agriculture should not be sought in court. The task of balancing the needs of tourism, agriculture, the state's regulatory design, and the public's right to participate in the formulation of its laws is one that should be left to the branches of government better equipped to make broad policy choices, not cast aside by resort to the requested preliminary injunction. Another United States Court eloquently phrased its reluctance to embark on a process of reengineering society by lawsuit:

"Plaintiffs have lost their way; they need to consult a map or a compass or a Constitution because Plaintiffs have come to the judicial branch for relief that may only be granted by the legislative branch." *Kolari v. New York Presbyterian Hospital*, 382 F.Supp.2d 562, 565-66 (S.D. N.Y. 2005).

The context here is different, but the outcome shouldn't be. Plaintiffs' Motion for Injunction must be denied.

Respectfully submitted,

s/ LeAnne Burnett

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of February, 2008, I electronically transmitted to the Court Clerk using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I hereby certify that on this 15th day of February, 2008 I served the same document via U.S. Postal Service on the following, who are not registered participants of the ECF system:

C. Miles Tolbert
Secretary of the Environment
State of Oklahoma
3800 N. Classen
Oklahoma City, OK 73118

s/LeAnne Burnett